IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION NO 47 OF 1993
IN
COMPANY PETITION NO 72 OF 1991
WITH
COMPANY APPLICATION NO 316 OF 1998
IN
COMPANY PETITION NO 189 OF 1987
WITH
COMPANY APPLICATION NO 376 OF 1998
IN
COMPANY PETITION NO 157 OF 1995
WITH
COMPANY APPLICATION NO 5 OF 1999
IN
COMPANY APPLICATION NO 204 OF 1996
WITH
COMPANY APPLICATION NO 16 OF 1999
IN
COMPANY PETITION NO 139 OF 1988
WITH
COMPANY APPLICATION NO 350 OF 2000
IN
COMPANY PETITION NO 37 OF 1987
WITH
COMPANY APPLICATION NO 353 OF 2000
IN
COMPANY PETITION NO 37 OF 1987
WITH
COMPANY APPLICATION NO 193 OF 2001
IN
COMPANY PETITION NO 205 OF 1996
WITH
COMPANY APPLICATION NO 189 OF 2001
WITH
COMPANY APPLICATION NO 251 OF 2001
IN
COMPANY PETITION NO 28 OF 1987
WITH
COMPANY APPLICATION NO 46 OF 2002
IN
COMPANY PETITION NO 79 OF 1989
WITH
COMPANY APPLICATION NO 288 OF 1999
IN
COMPANY PETITION NO 156 OF 1989
WITH
COMPANY APPLICATION NO 254 OF 2000

IN
COMPANY PETITION NO 156 OF 1989
WITH
COMPANY APPLICATION NO 208 OF 1997
IN
COMPANY PETITION NO 205 OF 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

LEGAL HEIRS OF DECEASED FAKIR-CHAND AMBARAM PATEL
Versus
O. L. OF AMRUTA MILLS LTD.

Appearance:
Mr.M.J.Thakore, Mr.S.N.Soparkar, Senior Counsel,Mr.A.L.Shah, Mr.A.C.Gandhi, Mr.M.B.Gandhi, Mr.A.S.Vakil,Mr.Mukesh A.Patel, Mr.Umesh D.Shukla, Mr.P.A.Mehta for Nanavati Associates, Mr.Mafatlal V.Shah, Ms.Mega Jani, Mr.D.S.Vasavada, Mr.Yatin Soni for petitioners.

Mr.S.B.Vakil, Senior Counsel with Sandeep Singhi for M/s.Singhi & Co., Mr.H.V.Chhatrapati, Mr.R.M.Desai for O.L. Mr.D.S.Vasavada for TLA, Mr.Pranav G.Desai, Ms.P.B.Sheth, Mr.A.D.Oza, Govt.Pleader , for respondents.

CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 30/07/2002

CAV. JUDGEMENT

1 In this group of Company Applications, the controversy revolves around the rights that the lessors or persons claiming to be heirs of the lessors have in different parcels of lands given on lease in distant past to various Companies, which are now in liquidation (the Company); they are claiming back the possession of the said lands on various grounds that have been stated in the applications and urged during the course of hearing.

2 Before adverting to submissions made on behalf of various contesting parties a brief recapitulation of historical facts is necessary.

3 On 7/10/1994 this Court (Coram :Mr.Justice M.S.Parikh), had passed a common order in Company Application No. 47 of 1993 with Company Application No. 48 of 1993 with Company Application No. 49 of 1993 in Company Petition No. 72 of 1991. The said applications filed by the heirs and legal representatives of deceased lessor of respective properties being land as particularly described in the applications were for directions to return the land to the said applicants. The Court came to the conclusion that the lease deeds in question were non determinable, fully transferable and assignable permanent lease deeds, and hence, even if a notice to determine such lease had been given such notice was not valid on correct construction of the lease deed in question. As a consequence, the Court held that the Company in liquidation represented by the Official Liquidator was not a statutory tenant; accordingly, it was not possible to direct the Official Liquidator to hand over possession of the lands in question. However, the Court directed payment of rent of the leasehold lands from the date of winding up directly to the lessors.

4 The matter was carried in appeal and the respective appeals were registered as O.J.Appeal Nos. 48, 49, 50 of 1998. The said appeals came to be heard along with two other appeals being O.J.Appeal No.68 of 1998 in Company Application No.207 of 1994 with O.J.Appeal No.70 of 1998. All the appeals were taken up for hearing together by Division Bench of this Court (Coram : Mr.Justice B.C.Patel [as he then was] and Mr.Justice K.M.Mehta), which were disposed off by a common judgment dated 16/12/1999. The Division Bench (speaking through Mr.Justice B.C.Patel) remanded the matter for giving further opportunity of hearing and to decide the matter afresh, because according to the Division Bench it was necessary to have on record the details as to whether the applicants were only heirs,

as to what would be the rights of the so called lessors in light of there being secured creditors having mortgage over the leasehold interest, and as to what would be the effect of such mortgage. Thus, the Court found that necessary material facts and findings on these and related questions were not available on record which would enable the Division Bench to decide the question. The Court further observed - " The question which is raised before us goes to the root of the matter but unfortunately the attention of the learned Single Judge was not drawn on certain relevant aspects by the Advocates appearing in the matter". In this context, the matter was remanded leaving it open to the Company Court to decide the matter afresh on the material that may be placed before the Court.

5 Thereafter, it appears that the aforesaid Company Applications which were remanded by the Division Bench and various other applications which came to be filed subsequently were taken up for hearing from time to time, but could not be proceeded with for various reasons. Ultimately on 14/2/2002,the Court (Coram: Mr.Justice M.S.Shah), after hearing the Advocates of various lessors as well as Advocates of different financial institutions and banks along with the Advocates for the Official Liquidator and the Textile Labour Association made a suggestion to the parties as to whether it was possible for the lessors to agree to transfer their freehold rights also, in the lands in question, so that a purchaser may pay higher price for getting entire bundle of rights in the lands in question. As the learned Counsel for the lessors made a proposal as stated in para 4 of the order dated 14/2/2002, the learned Counsel appearing for various secured creditors sought time to seek instructions from their respective clients as this was a policy matter and accordingly, the following order was made :

"6. In view of the above, the hearing of this group of matters is adjourned to 5th March,2002 subject to the following :-

[i] Those of the applicants who are agreeable to give up all their rights in the lands in question including their freehold rights, if any, shall submit a without prejudice proposal through their respective advocates to the respective advocates for the secured creditors and to the advocate for the Textile Labour Association with a copy endorsed to the Official Liquidator. This shall be done within one week from today i.e. by 21st

February,2002.

Where the State of Gujarat and/or ONGC are also parties to any litigation, their advocates shall also be served with a copy of the proposal.

[ii] Upon receiving such proposals, the advocates for the secured creditors, the Textile Labour Association, State Government and ONGC shall forward such proposals to their respective clients and get the response and/or without prejudice counter proposal latest by 4th March,2002.

[iii] If the secured creditors want to put up a united front for negotiating a settlement with the lessors' camp or if, they agree in principle to settle the matters, the competent authority at the higher level may take a broad policy decision leaving it to the local officers to negotiate and work out a detailed settlement".

6 However, it transpires that ultimately financial institutions and the banks were not agreeable to the course of action suggested and inspite of the matters being adjourned from time to time, it was found that there was no likelihood of any settlement as a whole i.e. by way of a policy, hence, the matters were taken up for hearing by this Court on a day to day basis. On behalf of the lessors various Advocates appeared but the lead was taken by Shri M.J.Thakor, Senior Advocate with Shri S.N.Soparkar, Senior Advocate supported by learned Advocates Shri Ashok L.Shah, Shri M.B.Gandhi, Shri A.C.Gandhi, and others. Similarly on the side of the Financial Institutions and Banks Shri S.B.Vakil, Senior Counsel instructed by Singhi & Co. appeared for ICICI and he was supplemented by learned Advocates Shri A.H.Mehta, Shri J.T.Trivedi, and others. Shri Roshan Desai, learned Advocate appeared on behalf of the Official Liquidator while Shri D.S.Vasavada, learned Advocate appeared on behalf of Textile Labour Association. In view of the fact that the contentions raised by different Counsels were overlapping to certain extent, it has become necessary to consider the contentions together: on the one side on behalf of the applicant lessors, on the other side on behalf of the financial institutions and banks, on the third side on behalf of the Official Liquidator and on behalf of the Textile Labour Association. Hence, it is not thought fit to reproduce the contentions as advanced by a particular Counsel but all contentions raised on behalf of various

contesting parties have been taken into consideration.

7 The various applications broadly claim the following reliefs :

[a] The Company is in arrears of rent and on non payment of the same the lease stands terminated entitling the lessors to claim back the possession.

[b] The Company having been ordered to be wound up, the land is not required for the purpose of the affairs of the Company, hence, the possession of the land be returned to the lessors.

[c] The Official Liquidator is only a statutory tenant which would not entitle him to sell the leasehold interest of the Company and thus the liquidator remaining in possession would be required to keep on paying the rent which would be onerous, and hence, the liquidator be directed to disclaim the property and hand over the possession to the lessor applicants.

[d] That till the rent was being regularly paid there was no right of eviction available with the lessors but at the same time the lessee had only a limited right of subletting and permissive user and did not have any right of assignment. That the lessee Company could not have created any charge over the demised premises as the lease deed or rent note did not permit such course of action.

[e] That the leasehold interest was not a property which could be treated as an asset of the Company and hence could not be dealt with. In other words, it was a mere right of possession and nothing more than that.

[f] That the nature of tenancy could be permanent/in perpetuity or for a life time or for a fixed period, but in no case could such a tenancy survive the Company. That, once an order of winding up was made, the Company, for all intents and purposes, ceased to exist leading to termination of the tenancy.

[g] Elaborating on the scope of right to mortgage the lease hold interest, it was submitted that though the Financial Institutions/Banks may have created a general charge over the properties of the Company, the leasehold interest not being a property of the

Company, no charge could have been created. That the mortgagees i.e. financial institutions/banks should be directed to place on record the details of mortgage under which they were claiming such rights.

[h] An additional contention was raised, which according to the learned Advocates was fundamental in nature, that Financial Institutions/Banks had been joined as parties only at the behest of the Official Liquidator and as ordered by the Court. That otherwise they had no locus in relation to the dispute which was primarily between the contracting parties viz. lessors and the lessees.

[i] That the land in question was for a specific purpose as narrated in the lease deed and hence when it was not possible to fulfill the said purpose the lease came to an end entitling the lessors to resume the land.

[j] A supplemental contention was also raised to the effect that the land was leased for the purpose of the affairs of the Company and once superstructure viz.plant and/or building put up on such land had been sold off there was no going concern or running business which would entitle the lessee to remain in possession of the land in question.

[k] Relying upon the provisions of The Bombay Rent (Hotel and Lodging House Rates Control) Act,1947 (for short 'the Rent Act), it was submitted that the Company was only a statutory tenant and hence it had only a right which was not alienable/transferable. A statutory tenant may have a heritable right, however, a limited company has no heir, and hence, that limited right available under the Rent Act, was not available to the Official Liquidator.

[l] That on dissolution of the Company the demised land had to be returned to the lessor or had to revert back to the lessor and there was no bona vacantia or escheat as no interest remained or survived.

[m] That the provisions of the Rent Act would prevail over the provisions of the Transfer of Property Act,1882 (T.P.Act) and the Contract Act,1872 (Contract Act), as the Rent Act was a special statute as against the general law laid down in the other two enactments. In this connection, it was

also contended that a lessee/tenant was not entitled to double protection i.e. under the T.P. Act and the Rent Act, and thus also only provisions of the Rent Act would apply.

[n] That even if the Court directed payment of arrears of rent, a statutory tenancy which had come into being by operation of law could not be converted back into contractual tenancy and the lessor was entitled to forfeit lease and the Court could not relieve the lessee from such forfeiture.

[o] That the lessors had reversionary interest and the same was never lost. That the rights conferred on the lessee Company could not be exercised by the Official Liquidator as the liquidator would only come into the picture when an order of winding up was made. Thus, the reversionary interest which remained with the lessor could not be snatched away by the Official Liquidator.

[p] In some of the matters upon reading of the lease deeds it was submitted that the terms of the deed provided an option to the lessor to terminate lease and hence it was a pointer to show that the lease was not permanent in nature.

[q] That there was no privity of contract or privity of estate betweeen the lessor and the third party viz. mortgagee and the contract actually existed between lessor and the lessee on the one hand while there was a different contract between the lessee and the third party i.e. mortgagee. Therefore, if the lessee did not have any right to retain possession it would not be open to the third party viz. the mortgagee to seek such right.

[r] That the Official Liquidator did not require the land for the purpose of liquidation as he was not entitled to sell the land in question, that there was no sub-letting and the Official Liquidator was also not entitled to sublet and thus there was no reason to keep on paying rent, hence even a statutory tenant could be evicted for non user of the premises.

8. As against this, on behalf of the Financial Institutions/mortgagees it was submitted that the lessors must show that they have an absolute right in preasenti before seeking direction against the Official Liquidator to

hand over possession of the leased property :

[a]. That such a right should not be qualified or defeasible right. The lessor can claim such right provided he has forfeited the term of the lease pursuant to right of re-entry as provided in the lease deed, or in the alternative, give notice to the Company for termination of the tenancy.

[b]. That even in such cases there is no absolute right and in case of claim of forfeiture on the ground of arrears of rent, such a right would be subject to provisions of Section 114 of the T.P.Act whereby a Court can relieve a Company against forfeiture as provided in the said section.

[c]. Even assuming for the sake of argument that the Company has become a statutory tenant, the right to recover possession would be subject to the protection laid down in provisions of Section 12 of the Rent Act, and till the point of time, a decree for eviction of the tenant is made by a competent Court there would be no absolute right in praesenti available to the lessor.

[d]. That the lessor does not have right to claim possession on the ground of arrears of rent in all cases.

[e]. That in case of lease of permanent nature or lease for fixed long periods which have not been determined by efflux of time the contractual lease would continue to operate.

[f]. That life time lease would be co-terminus with the life of company and till date no Company has been directed to be dissolved.

[g]. That the order of winding up and order of dissolution are two distinct situations/stages and the order of winding up cannot be treated as being equivalent to an order of dissolution.

[h]. That the right to disclaim an onerous property is available with the Official Liquidator and it is not open to the lessors to seek direction against the Official Liquidator to disclaim the property.

[i]. That Section 535(1) of the Companies Act,1956 ('the Act) specifies four types of properties and if the property does not fall within any of the

four clauses, the Official Liquidator has no right to disclaim. That the leasehold rights would not fall within sub-clause (b) or sub-clause (d) of Section 535(1) of the Act. That apparently, though clause (a) might seem to apply, it will be necessary for the lessor to show that the land in question is burdened with onerous covenant.

[j]. That liability to pay rent is not per se onerous covenant; once the financial insitutions/mortgagees undertake such liability the same would cease to operate as being onerous, even if it is presumed to be onerous.

[k]. Unexpired period of contractual lease is transferable under Section 108(j) of the T.P.Act in absence of contract or legal usage to the contrary.

[l] That the decision of the Supreme Court in case of Damadilal lays down that even rights of statutory tenants are transferable.

[m] That even if the Court thinks it just to direct the Official Liquidator to disclaim the leasehold interest it is open to the Court to impose such terms as conditions for granting leave to disclaim, whereunder the rights of the mortgagee shall continue to operate on the leased property, notwithstanding the merger of the leasehold rights with the lessor's ownership rights.

[n] That even otherwise the provisions of Section 535 of the Act, envisage that a mortgagee can apply to the Court to make an order of vesting of property or delivery of the property to whom it may seem just by way of compensation, and mortgagee is a person who has such interest in the leasehold properties and therefore, upon the terms specified the Court may make such an order.

[o] That provisions of T.P.Act and Contract Act being Central legislations would claim precedence over the state legislation viz. Rent Act, and hence the rights under the general law would not be affected. Therefore, relief against forfeiture by virtue of Section 114 of the T.P. Act can be granted by the Court.

[p] That the protection under Section 114 of the T.P. Act is different than the protection under Section

12 of the Rent Act, because Section 12 of the Rent Act, does not enable the landlord but only disables i.e. protects a tenant while Section 13 of the Rent Act dilutes the disablement under Section 12 of the Act.

[q] That the notice of forfeiture or notice for arrears are different from a notice for termination of a lease and the latter does not follow as a consequence.

[r] That unless provided by the contract, right of re-entry is not available in lease which is permanent/in perpetuity/for life time or a fixed period.

[s] That once the property is under a charge/mortgage, the Official Liquidator who has stepped into the shoes of a lessee should not be permitted to join hands with the lessor so as to defeat the rights of the secured creditors.

[t] That the terms and conditions of individual mortgages may be taken into consideration only at the point of time when secured creditors insist and the Court permits sale of the property and it is not necessary to deal with such individual mortgages at this stage.

[u] That the provisions of the Rent Act are not intended to apply dehors the contract and other laws as contended by the lessors.

9 Mr.R.M.Desai, appearing on behalf of the Official Liquidator contended that the lease deed had been entered into at a given point of time and for deciding whether the lessors are entitled to resume, the terms of a particular deed will have to be read and interpreted; that it was now settled rule of construction that deed as a whole had to be read for this purpose. Further more, it was submitted that the intention of the lessor at the time when the deed was entered into shall have to be taken into consideration while appreciating the contentions raised on behalf of the legal heirs.

[a] That as directed by the Division Bench of this Court, the applicants will have to establish not only that they are legal heirs of the lessor but also that there are no other heirs or, the other existing heirs have no interest in the property in question.

[b] That the lessors and/or their heirs/representatives cannot be heard to challenge joining of the mortgaees i.e. financial institutions as party respondents, because the Official Liquidator was merely abiding by the direction given by the Division Bench of this Court.

[c] That as could be seen from the judgement of the Division Bench of this Court the matters were specifically remanded to take into consideration the rights of the mortgagees and lessors cannot contend that they were third party.

[d] That the Official Liquidator cannot make payment of rent on his own unless directed by the Court and the lessors instead of applying to the Court for such direction cannot come forward and seek eviction on the basis of non payment of rent.

[e] That the position in law was well settled that the rights of the lessor and the lessee as stipulated by the contract continue till the Company was dissolved and as the Company has not yet been dissolved all the rights under the lease deed are available to the Official Liquidator.

[f] Responding to the contention that the purpose for which the lease had been granted having come to an end the Official Liquidator must return the possession of the property, it was submitted that the terms of the lease deed would have to be seen individually and whether any such right was available to the lessor will have to be determined.

[g] It was contended that the Official Liquidator was not a statutory tenant and there was no onerous covenant incorporated in the lease deed.

[h] That the payment of rent could not be equated with onerous covenant because an onerous covenant was one which had to form part of the terms of the deed.

[i] That even otherwise the Official Liquidator was ready and willing to pay the rent if so directed by the Court, and even the secured creditors had undertaken to provide funds to do so and thus the Court should not pass any order directing the Official Liquidator to disclaim the property.

[j] That the leasehold interest was a valuable right which was transferable and the Official Liquidator who was required to protect the interest of the workers should not be directed to part with the valuable asset of the Company merely on non payment of rent.

10. Mr.D.S.Vasavada, learned Advocate for Textile Labour Association submitted that the lessor had a right to receive rent as stipulated in the lease deed and till the lessor receives rent, the lessor would not be entitled to possession of the land. It was submitted that the Official Liquidator has already expressed his readiness and willingness to pay rent with consent of secured creditors and Textile Labour Association and hence the applications filed by the lessors deserve to be rejected. Thus, the interest of the lessors would stand protected and even if the leasehold rights will be sold in future, the purchaser of such leasehold rights will be bound by the terms and conditions of the lease deed. The lessors are not entitled to possession under the provisions of either T.P. Act or Rent Act or the Companies Act and the leasehold rights being the assets of the Company such rights could be sold as laid down in various decisions.

11. Some of the learned Advocates appearing on behalf of the lessor-applicants raised a preliminary contention to the effect that, though as directed by the Court, various secured creditors and the Textile Labour Association have been joined as party respondents, as the so called secured creditors have not placed any details about any charge created in their favour by the lessees, such secured creditors should not be heard. That, alternatively, even if they are to be heard, they should be directed to place on record the details regarding the charge created in their favour which would enable the applicants to file their response. This contention requires to be stated to be rejected. This objection could have been raised at the point of time when the applicants were directed to join the secured creditors and the TLA as necessary parties. Furthermore, in the light of the aforesaid decision of the Division Bench dated 16/12/1999, this objection cannot be countenanced. However, it would be open to a party to obtain necessary details and challenge a particular transaction of mortgage based on particular facts of the case but no such general direction can be given as demanded on behalf of the applicants.

12. Section 535 of the Act provides under sub-section (3) that the Court is required to hear interested persons before granting leave to disclaim and also impose such

terms as a condition while granting such leave. Sub-section (6) of Section 535 enables a person claiming interest in property to apply to the Court even if the property is already disclaimed. Thus, the entire claim envisaged under Section 535 of the Act requires that all interested parties should be heard before granting any leave of disclaimer and this is one more reason why the financial institutions and banks are necessary parties and have to be heard.

13. Section 439 of the Act, lays down the procedure including specifying persons who can make a representation for winding up. After the order of winding up has been made by the Court one of the consequences would be as prescribed under section 446 of the Act. Sub-section (1) of Section 446 places absolute ban as to filing of a suit or commencing other legal proceedings or proceeding with any such suit or legal proceedings which are pending on the date of winding up order against the Company except by leave of the Court and subject to such terms as the Court may impose while granting such leave. Sub-section (2) of Section 446 however carves out an exception: the Court which is winding up the Company shall have jurisdiction to entertain or dispose of :

[a] any suit or proceeding by or against the Company,

[b] any claim made by or against the Company,

[c] any application made for compromise or arrangement as prescribed under section 391 of the Act, and,

[d] deciding the question of priorities or any other question whatsoever, whether of law or fact, relatable to or arising in the course of the winding up proceeding.

Sub-section (3) of Section 446 provides that, any suit or proceeding filed by or against the Company which is pending in any other Court i.e. the Court other than one which is seized with winding up proceeding was required to be transferred and disposed off by the Court winding up the Company regardless of any other law for the time being in force. Sub-section (4) of Section 446 is not relevant for the present purpose. It is pertinent to note that the important words in Sub-section (3) of Section 446 are : "notwithstanding anything contained in any other law for the time being in force". In context of these provisions it will become necessary to deal with the controversy raised in this group of petitions.

14. Section 529 of the Act vide Proviso under clause (c) of sub-section (1) stipulates that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen. Therefore, moment the secured creditors come into picture in winding up proceedings, the workmen will follow suit as provided in Proviso to Section 529(1) clause (c).

Section 529A grants a preferential status to workmen's dues. Thus, even these provisions will have to be borne in mind while deciding controversy at hand.

15. Section 535 of the Act deals with disclaimer of onerous property in the case of the Company which is being wound up. Sub-section (1) of Section 535 specifies four types of properties and thereafter lays down that the liquidator may with the leave of the Court and subject to the provisions of Section 535 at any time within twelve months after the commencement of the winding up or such extended period as may be granted by the Court disclaim the property. The Proviso specifies that such period of twelve months shall commence at any time after the liquidator becomes aware of a particular property which he was not otherwise aware within one month after the commencement of the winding up proceeding. As can be seen from the nature of property specified in this sub-section, the liquidator may exercise discretion available to him provided he finds that the property in question is of such a nature that it would be onerous to retain the property in liquidation proceedings having regard to the nature of the property. Therefore, apart from the fact as to whether under the provisions of the Rent Act or the T.P. Act or the Contract Act, the applicant may or may not be entitled, there being a special provision under the Act, specifically prescribing the nature of property, and prescribing the procedure to be adopted, whether the applicants have been able to establish the existence of pre-requisite conditions laid down in Section 535 of the Act will also have to be examined.

16 While determining the controversy it was necessary to keep in mind the object of winding up proceedings. The Court while winding up a Company is required to facilitate the protection and realisation of the assets of the Company so as to ensure that equitable distribution of the assets takes place amongst those who are entitled to recover from the Company. It is with this view that the Court takes over the assets of the Company and keeps them under its control through the liquidator. Thus, in furtherance of this object the provisions of Section 446 of the Act have been engrafted on the statute and the Section is intended to safeguard such assets of the Company in winding up so

that wasteful or expensive litigation is taken care of and controlled by the COurt once the Court assumes jurisdiction. It is in this context that an unsecured creditor of the Company is not empowered to file a petition against the Company by resorting to clause (b) of sub-section (2) of Section 446.

17. Various decisions which have been cited during the course of hearing will have to be understood and read in the context in which the same have been rendered. The Supreme Court has time and again laid down the guidelines for reading and applying its own decision.

[a] In the case of Municipal Committee Vs. Hazara Singh, 1975(1) SCC 794 the Supreme Court dealing with the matter of provisions of Food Adulteration Act approved the approach of the High Court of Kerala in the following terms :

> "Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force. Several decisions of the Supreme Court are on facts and that Court itself has pointed out in Gurcharan Singh v.State of Punjab and Prakash Chandra Pathak v. State of Uttar Pradesh that as on facts no two cases could be similar, its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases."

[b] In the case of CIT vs. Sun Engineering Works Pvt.Ltd.[1992] 198 ITR 297, the Apex Court has cautioned against reading its own judgment in a truncated manner in these words :

> "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision

of this court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9; AIR 1971 SC) :

It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

[c] In another decision in case of Director of Settlements, A.P. and others v.M.R.Apparao and another 2002 AIR SCW 1504, the Apex Court once again enunciated the law in these words:

" xxx xxx Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has 'declared law'it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the

> observation was unnecessary for the decision pronounced, but even though an obiter may not have a bind effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See AIR 1970 SC 1002 and AIR 1973 SC 794). When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity. (See 1984(2)SCC 402 and 1984(2) SCC 324). xxx xxx "

18. Thus, what is required to be decided is whether various decisions cited at the bar are applicable and if so, to what extent. The decisions rendered by the Apex Court in relation to different statutes will have to be read, understood and applied accordingly. It is not possible to agree with contentions of either side that only decision rendered under general law viz. T.P. Act and Contract Act should prevail vis-a-vis other laws, or that decisions rendered while interpreting provisions of Rent Control Acts only should form the basis of decision. The case of the applicants basically and primarily revolves round the provisions of the Rent Control laws and the concept of statutory tenant as understood under the said laws.

19. An incidental question that arises is as regards the nature of the property in question. First of all whether the leasehold interest is a property or not, and if it is a property whether it is an estate which belongs to the Company enabling the Company to deal with the same. The law on this subject as laid down by this Court and the Apex Court may be taken into consideration.

20. This Court in the case of Rajabali Nazarali and Sons Vs. Commissioner of Income Tax, 163 ITR 7 states:

"Now, a lease creates an interest in immovable property and transfer of leasehold rights which are protected by the provisions of the rent restriction statutes is nothing but a transfer of a capital asset. The price paid to acquire such leasehold rights can only be held to be payment on capital account, there being no revenue quality attributable to the same. Therefore, any payment received, whether by way of compensation or under any other nomenclature, for parting with the capital asset, namely, the demised premises, can only be described as a capital receipt and not a trading receipt".

xxx xxx xxx xxx

"The expression "capital asset" is defined in section 2(14) to mean property of any kind held by an assessee, whether or not connected with his business or profession, but does not include stock-in-trade, personal effects, agricultural land in India and Gold Bonds and other bonds. Interest in immovable property would, therefore, be property and hence a capital asset xxx xxx "

20.1. In the case of Shree Chamundi Mopeds Ltd. Vs. Church of South Indian Trust Association, (1992) 3 SCC 1, the Apex Court laid down that leasehold interst of the lessee in the premises leased out to him is a property which can be transferred and can also be attached and sold by way of execution in satisfaction of decree against lessee. In that sense it can be said that the leasehold interest of a Company is its property. However, the Court also carved out exception by stating that leasehold interest of the appellant Company being a statutory tenancy in the premises leased out, cannot be said to be a property for the purpose of Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA' for short). The Apex Court came to this conclusion by referring to the preamble of SICA while interpreting the provisions of Section 22(1) of SICA by taking into consideration the purpose for the enactment of the said Act.

21. It is settled law that one of the modes of termination of tenancy is forfeiture and the same is provided in Section 111(g) of the T.P. Act, but it must be borne in mind that forefeiture can only be of existing term which would otherwise continue but for the forefeiture.

The tenancy can be said to be determined by forefeiture when a tenant incurs breach of an express condition which provides that on incurring of such breach the landlord is entitled to re-enter the demised premises. The right of the landlord to forfeit thus comes into existence on the relevant condition being fulfilled. Section 114 of the T.P.Act provides for relief against forefeiture, but the said Section cannot be invoked in cases where the tenancy is not determined by forfeiture. Therefore, it would become necessary to ascertain the mode by which the interest of the tenant in the premises comes to an end and the landlord becomes entitled to recover possession of the premises from the tenant. Hence, it is necessary to determine whether the Court has any jurisdiction apart from the provisions of the Rent Act to grant relief against dispossession to a tenant in cases where the landlord has determined the tenancy by a mode other than forfeiture.

22. It is beyond the pale of controversy that the purpose of enacting Rent Act was to afford protection to a tenant against dispossession by landlord under the general law. One such restriction has been imposed by the provisions of Section 12 of the Rent Act. As can be seen from provisions of Section 12 of the said Act, it is more a provision which disables a landlord from seeking possession than enables the tenant to seek protection. The result of the enactment of Section 12 of the Rent Act is that the right which the landlord otherwise had with the ordinary law being applicable to landlord and tenant, came to be restricted and conferred status of irremovability on the tenant against the landlord claiming possession of the property after determination of his tenancy. This situation has been commonly referred to as statutory tenancy as against the contractual tenancy which existed till that point of time. The tenant's possession would be, in a case where the contract of tenancy or lease has not come to an end, by virtue of the terms of the contract. In other words, if the tenant is entitled to possession by virtue of provision of any other statute apart from the Rent Act, such right is not affected by the provisions of the Rent Act and even if there might be a situation where some conditions stipulated in a provision of Rent Act come to be satisfied, the tenant would yet be entitled to resist the claim of landlord for possession of the premises, if otherwise entitled to dehors the provisions of the Rent Act. A tenant needs no protection against eviction by the landlord so long as he has necessary protection under the terms of the contract entered into with the landlord. A tenant's right to hold over after the termination of the contractual tenancy is different from the right to protection during the contractual tenancy and the two

rights must be kept distinct from each other. In case of the former right provisions of the Rent Act come into play, while in case of the later right, ordinary law governing the rights of the tenant and landlord would become applicable.

23 It is settled law that the period of a subsisting lease cannot be curtailed in absence of a forfeiture clause in the lease deed. The contractual tenancy would thus subsist as governed by provisions of the T.P. Act and there cannot be any eviction from such tenancy.

24 At a given point of time a view prevailed that the statutory tenancy was a personal right to remain in occupation after the contractual tenancy had been determined and there was no right to property but the position today is clear and well settled. Tenancy is primarily a contract between landlord and tenant. During subsistence of a contractual tenancy the tenant has an estate or property in the subject matter of the tenancy and such an estate or property is heritable. Therefore,upon determination of such tenancy the estate does not necessarily disappear and the status of irremovability granted in favour of the tenant by the statute makes it clear that unless the decree or an order of eviction is made against the tenant he remains tenant as he was before the determination of the contract. Thus, the incidents of such tenancy i.e.statutory tenancy and contractual tenancy are the same unless there is any provision in the Act conveying a contrary intention.

25 Once the aforesaid position in law was settled, a question arose as to whether the right of heritability was available in respect of commercial tenancies or whether such a right was restricted to residential tenancies. The said dispute also stands settled by the Apex Court : it has been laid down that if the Rent Act in question defines the tenant in substance to mean a tenant who continues to remain in possession even after the termination of the contractual tenancy till a decree of eviction against him is passed, the tenant even after the determination of the tenancy, continues to have an estate or interest in the tenanted premises and the tenancy rights both in respect of the residential premises and commercial premises are heritable.

26 During the course of hearing great emphasis was laid on provisions of Section 15 of the Rent Act, to contend that once statutory tenancy has come into being it would not be possible to assign or transfer the tenancy in any manner whatsoever except as stipulated in the Proviso

under Section 15(1) of the Rent Act. This contention was specifically raised in the case of Kalyanji Gangadhar Bhagat vs. Virji Bharmal and Another, (1995) 3 SCC 725, wherein it was contended that the Proviso must relate to contractual lease only. The Apex Court rejected this contention and held that Proviso was relatable to the premises held under statutory lease also and not merely to contractual leases. The Court after reproducing extract from earlier decision stated that :-

> "It is beyond doubt that a statutory tenant has every right to enjoy estate or interest in the tenanted premises despite the termination of the contractual tenancy".

27. Another position in law which is well settled is that merely because Company goes in liquidation and liquidator is appointed, the rights of the Company vis-a-vis its landlord do not undergo any change and they continue to be governed by subsisting contract.

28. It was contended on behalf of the landlords that where the land was let out for a stated purpose though without fixed period the presumption was that it was intended to create a tenancy for the life time i.e. life time of the Company and could not be treated to be a permanent tenancy. In this connection, suffice it to state that the forms in which the tenancy rights are created are not uniform and hence, the nature of the tenancy must be determined by construing a document as a whole; while construing the documents of such contracts the Court must look at the substance of the matter and decide what the parties really intended.

29. During the course of hearing some specimen copies of lease deeds were read out and relying upon one of the terms wherein it was stipulated that the lessee was entitled to give back the possession if and when the lessee chose to do so, it was contended that the tenancy was at will and not permanent tenancy. As laid down by the Apex Court in the case of Sivayogeswara Cotton Press, Devangere and others vs. M. Panchaksharappa, reported in AIR 1962 SC 413,:

> "It is a right reserved in favour of the lessee and does not confer any corresponding right on the lessor when no such right is reserved. Such a right in favour of the lessee cannot be converted into a disability or an obligation which should detract from the grant of a permanent tenancy".

30. In the case of Narendra Bahadur Tandon vs. Shanker Lal (Since deceased) by Lrs., AIR 1980 SC 575, the Apex Court stated thus :

> "If the company has a subsisting interest in the permanent lease on the date of dissolution such interest must necessarily vest in the Government by escheat or as bona vacantia. In India, the law is well settled that the property of an intestate dying without leaving lawful heirs and the property of a dissolved Corporation passes to the Governemnt by escheat or as bona vacantia. Of course such property will be subject to trusts and charges, if any, previously affecting it. If the leasehold interest of the Company in the land become vested in the Government on the dissolution of the Company it must follow that the suit at the instance of the plaintiffs (the successor-in-interst of lessor) for possession of land is not maintainable".

31. The provisions of the Companies Act, 1956 and the Rules made thereunder if read in conjunction and as a code, from the aim, object and the intention that can be gathered it is quite apparent that properties of a Company in liquidation vest in the Court or the Liquidator appointed by the Court who acts as a Custodian on behalf of the Court. Such a vesting and/or custody of the properties is not only for the purpose of taking care of the interest of the creditors and contributories but also of the workmen who have pari passu charge. This would enable the Court to exercise jurisdiction in relation to all the properties of the Company in liquidation including valuable assets like leasehold rights of unexpired portion of the lease. There cannot be any dispute as regards the legal position that the corporate existence of the Company in liquidation continues till dissolution and the liquidator steps into the shoes of the Company; he is however, under the control and supervision of the Court and whatever he does, more particularly, in respect of the sale of the assets of the Company in liquidation is for the purpose of implementation of the order and under sanction of the Court. In case the Court is not empowered to deal with an asset like leasehold interst of the Company in liquidation it may, in a given situation, either give rise to or encourage mal practice by dishonest persons. Hard facts and realities of life have to be taken note of by the Court; normally the properties which are leased out to the Company are owned by either Directors or their relations or persons who are substantially amenable to directions of one or more Directors of the Company in liquidation. Thus, on the one

hand by permitting winding up of the Company and on the other hand relieving Company of valuable assets by seeking possession thereof, such Directors or other persons would take advantage of their own defaults like mismanagement or misappropriation of the properties of the Company in liquidation. Similar is the view expressed by the High Court of Calcutta in Kailash Financiers (Calcutta) Pvt.Ltd. 1982(1) Company Law Journal 100.

32. This decision came to be followed and applied by the Bombay High Court in the case of Vaz Forwarding Limited vs. State Bank of India and others, 85 Company Cases 603. The Bombay High Court laid down that the leasehold rights of the Company were valuable assets and Section 15 of the Rent Act did not create any legal impediment in the transfer/assignment of leasehold rights in the premises because till Company was dissolved it retained its corporate existence though administrative affairs of the Company passed on to the liquidator.

33. In the case of United Bank of India vs. Official Liquidator and others (1994) 1 SCC 575, the Apex Court after examining the provisions of Section 535 of the Companies Act laid down as under :

> "The intention of Section 535 is to protect the creditors of the company in liquidation and not mulct them by reason of onerous covenants. The power under Section 535 is not to be lightly exercised. Due care and circumspection have to be bestowed. It must be rememberd that an order permitting disclaimer, while it frees the company in liquidation of the obligation to comply with covenants, puts the party in whose favour the covenants are, to serious disadvantage. The Court must therefore, be fully satisfied that there are onerous covenants, covenants which impose a heavy burden upon the company in liquidation, before giving leave to disclaim them."

34 After the aforesaid discussion the Court also, while dealing with the facts before it, stated that payment of rent cannot be said to be an onerous covenant taking into consideration the long period of lease; and once the Bank, a secured creditor agrees to pay mesne profits with arrears of rent it was not possible to hold that the provisions of Section 535 of the Act were attracted and the Official Liquidator was justified in applying for disclaimer under the said provision.

35 One of the decisions of the Apex Court in case of

Ravindra Ishwardas Sethna vs. Official Liquidator, AIR 1983 SC 1061, was heavily relied upon on behalf of the applicant landlord in support of the contention that the premises were not required by the liquidator for the affairs of the Company and hence the Court must pass an order directing the liquidator to return the same. As stated hereinbefore the decision of the Court will have to be read in the context of controversy which the Court was called upon to decide.

35.1 The facts of the case before the Supreme Court were that the Company therein was a tenant/lessee of the premises of which the appellant before the Court were the landlords. The date of commencement of the lease was not available and it was not the case of the liquidator that the lease was of a long duration. Upon an order of winding up having been made the liquidator who was in possession of the premises did not need the premises for carrying on winding up activities nor was the premise required for the business of the Company. The learned Company Judge therefore directed the liquidator to give the premises to a third party under a caretaker agreement. It was this action of the Company Court which was challenged before the Supreme Court. Therefore, the observations made by the Apex Court directing surrendering of possession to the landlord will have to be understood in that context. In the cases at hand the facts show that the lease deeds are either permanent or of long duration or at least for the life time of the Company.

36 In some of the applications, the applicants have prayed to hand over vacant and peaceful possession of parcels of lands particularly described in the application as well as for payment of recovery of rent. The prayer for payment of rent is an alternative prayer, viz. if the possession is not handed over the lessors should be held entitled to rent. At the same time, there are some applications wherein only leave is sought to proceed with the suits for recovery of rent, or in the alternative, prayer for eviction is made. In such applications, relying upon Section 446 of the Act it was contended that such suits or pending proceedings may be transferred to this Court and the prayer for eviction be granted. By this common judgement each individual application and prayers made therein have not been dealt with as such, but in light of the fact that the learned Advocates have only contended and submtited as regards determination of tenancy and handing over of possession, the said aspect is being decided. It will be open to the parties to file fresh applications seeking alternative specific reliefs, in case the applicant is so entitled in law.

37 On overall reading of the lease deeds which have come on record it is apparent that the terms of the lease are mostly permanent or in perpetuity, or for long fixed periods or at least till life time of the Company. The position therefore which emerges is, that the contract which was entered into by the lessors with the company subsists. Once that is so, the position in law is settled that the tenant, viz. the Companies herein, would be entitled to seek protection under the contract dehors the provisions of the Rent Act. In none of the cases, was it contended or pointed out that there is any breach of express condition which would entitle the landlord to invoke forfeiture. Even if non payment of rent for a particular period could be treated as a breach of one of the conditions the terms of the lease deeds do not envisage forfeiture. For the sake of argument, in a given case, even if it is to be found that non payment of rent would entitle the landlord to seek determination of the lease it would be open to the Court to relieve from forfeiture by issuing appropriate directions. However, all these aspects will have to be taken into consideration, in each individual case, after the landlord applicant is able to establish not only non payment of rent, but entitlement to forfeiture and further that he has served a notice for such forfeiture.

38 As already seen hereinbefore Section 535 of the Act, specifically grants a discretion to the liquidator to seek leave of the Court to disclaim the property, provided it is burdened with onerous covenants. The first question therefore that would arise is, as to whether it would be open to any applicant to seek direction to the liquidator from the Court that the liquidator should disclaim the property. The answer has to be in the negative : Section 535(1) of the Act specifically states that the liquidator may with the leave of the Court by writing signed by him disclaim the property. Therefore, the application has to be one which has to be in writing, which has to be signed by the liquidator and which has to be for disclaimer of the property falling within the four classes of property, particularly described in the said section. In none of the present cases there is any application for disclaimer which would require the Court to determine whether a leave as sought for should be granted.

39. This Court, speaking through Justice Balia in the case reported in 1999(1) GLR 429 has very categorically turned down similar prayers for handing over possession to the landlords and in the present proceedings no good reason is advanced to take a contrary view of the matter.

40. To summarise :

[a] Leasehold interest is an intangible asset, which is valuable in nature though the valuation may differ from case to case depending upon the unexpired period of lease.

[b] Such an asset is transferable subject to the same terms and conditions as may be stipulated in the lease deed.

[c] Once there is a contract which has not been determined, the relationship of the parties to the contract continues to subsist till the period for which the contract is in existence subject to an express condition to the contrary.

[d] There is a distinction between the point of time when an order of winding up is made and at the point of time when an order of dissolution is made, the company continues to exist between the two terminii.

[e] A condition in the lease deed permitting a lessee to give back the possession as and when the lessee chooses to do so cannot be converted into an obligation entitling the lessor to seek possession.

[f] A condition in the lease deed by way of requirement to pay rent, per se, does not create an onerous covenant, once readiness and willingness is shown by the lessee, or on its behalf, to discharge such obligation.

41. In light of what is stated hereinbefore, it is not possible to accept the case of the applicants. The possession of the land in question cannot be directed to be handed over to the applicant landlords for the various reasons stated hereinbefore. The applications are therefore rejected. There shall be no order as to costs.

Sd/-

(D.A.Mehta, J)

m.m.bhatt